IN THE

Supreme Court of the United States

October Term, 1956

No. 276

GENERAL ELECTRIC COMPANY,

PETITIONER

vs.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (U.E.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNIED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 59-82), vacating the judgment of the United States District Court for the District of Massachusetts, is reported in 233 F. 2d 85. The opinion of the District Court (R. 50-53) is reported in 129 F. Supp. 665.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1956 (R. 82). The petition for a writ of certiorari was granted on October 8, 1956 (R. 83). The jurisdiction of this Court rests on 28 U.S.C. §1254.

STATUTES INVOLVED

The statutes involved are the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §141 *et seq.*; the United States Arbitration Act, 43 Stat. 883, re-enacted 61 Stat. 669, 9 U.S.C. §1 *et seq.*, as amended by Act of September 3, 1954, 68 Stat. 1233; and the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §110 *et seq.* The pertinent provisions of these statutes are set out in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether, in an action in which jurisdiction is based upon § 301(a) of the Labor Management Relations Act of 1947, a federal district court is authorized by § 4 of the United States Arbitration Act to compel specific performance of an arbitration clause in a collective bargaining contract, despite the Act's limitation to contracts "evidencing a transaction involving commerce" in § 2, and its express exclusion of "contracts of employment" in § 1, and despite the requirement of § 4 that the court must have jurisdiction under Title 28 of the controversy "save for such agreement" to arbitrate.

2. Whether § 301 of the Labor Management Relations Act of 1947 should be interpreted to expand the jurisdiction of the federal courts to entertain actions to compel arbitration under labor contracts notwithstand-

ing that the language of § 301 and its legislative history show that Congress declined to create that new remedy for such contracts.

3. Whether, despite the prohibition of the Norris-LaGuardia Act against any "injunction" in "labor disputes", a federal court has jurisdiction to enforce by injunctive process arbitration of a controversy between a union and an employer concerning terms and conditions of employment in a case where there has been no compliance with the provisions of § 7 of that Act.

STATEMENT OF THE CASE

Petitioner, General Electric Company (hereinafter referred to as "the Company") is a New York corporation having a manufacturing plant at Ashland, Massachusetts (R. 42). It engages in, and its activities at its Ashland plant affect, interstate commerce (R. 42). The respondent, Local 205, United Electrical, Radio and Machine Workers of America (U.E.) (hereinafter referred to as "the Union") is a voluntary unincorporated labor union with its principal office in Ashland, Massachusetts (R. 42). It has been certified by the National Labor Relations Board, and is recognized by the Company, as the collective bargaining agent for hourly rated production and maintenance workers employed by the Company at its Ashland plant (R. 42).

The Union and the Company entered into an agreement (which was in full force and effect at all times relevant hereto) establishing hours, rates of pay and working conditions for hourly-rated production and maintenance workers at the Company's Ashland plant

(R. 7; Exhibit A to complaint). The agreement provided a four-step procedure for the settlement of employee grievances (Agreement, Art. XII, R. 31). It further provided that "any matter involving the application or interpretation of any provisions of this Agreement", with certain specific exceptions, "may be submitted to arbitration by either the Union or the Company", by written notice given after the decision in the fourth step of the grievance procedure (Agreement, Art. XIII, R. 32).

On April 2, 1954, the Union filed a written grievance that one Boiardi, an employee at the Ashland Plant, was being paid at a lower rate of pay than that specified in his job classification (R. 44), and on August 13, 1954, a written grievance that another employee at the Ashland plant, one Armstrong, had been discharged arbitrarily and not for cause (R. 45). Both these grievances were carried through the fourth step of the grievance procedure, and, not having obtained results satisfactory to it, the Union notified the Company that it was submitting these grievances to arbitration (R. 44, 46). The Company advised the Union of its refusal to arbitrate these grievances (R. 44, 46), taking the position that they were not arbitrable under the terms of the arbitration clause.

Thereupon the Union brought the present action in the United States District Court for the District of Massachusetts, alleging in its amended complaint that the action arose under §§301(a)-(c) of the Labor Management Relations Act of 1947, and praying that the Company be required to submit the grievances to arbitration and for damages (R. 42-47). The Company moved to strike that portion of the prayer for relief

asking that it be compelled to arbitrate, on the ground that the court had no jurisdiction to grant that remedy (R. 47). The District Court granted the motion (R. 55), holding that the Norris-LaGuardia Act precluded the granting of an injunction to compel arbitration of an alleged breach of a collective bargaining agreement (R. 50-53). The Union then moved to amend its amended complaint so as to eliminate any prayer for damages (R. 55). This motion was allowed, and, since the complaint as thus amended sought only an order directing the Company to arbitrate, the District Court, in accordance with its earlier ruling, entered final judgment dismissing the action for want of jurisdiction (R. 56).

On appeal, the Court of Appeals reversed (R. 82), holding that, although the controversy between the parties involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, nevertheless the provisions of §7 of that Act were not applicable to an action to compel arbitration of grievances under a written contract. The court then proceeded to consider whether there was any basis on which a federal court could order enforcement of the arbitration agreement. On this question it held: (1) that in an action under §301 (a) of the Labor Management Relations Act, the availability of the remedy of specific enforcement of an agreement to arbitrate was to be determined by federal, not state, law; (2) that in the absence of an explicit statutory basis, federal courts could not enforce executory agreements to arbitrate; (3) that no such statutory basis was created by §301 (a) of the Labor Management Relations Act itself; (4) that the United

States Arbitration Act, however, provided an integrated system for compelling arbitration; (5) that the arbitration provision in the collective bargaining agreement in question was "a contract evidencing a transaction involving commerce" within the meaning of §2 of the Act and was not excluded from the operation of the Act by §1 thereof as a "contract of employment" of "workers engaged in foreign or interstate commerce"; and (6) that the remedy of specific enforcement, provided by §4 of the Act, was available. Accordingly it remanded the case of the District Court for further proceedings.

SUMMARY OF ARGUMENT

I. The United States Arbitration Act does not cover arbitration provisions in a collective agreement between a union and an employer since §1 of the Act expressly excludes "contracts of employment" and since such an agreement is not a contract "evidencing a transaction involving commerce" within the meaning of §2. Consideration of the history of the Act shows that it was intended to cover only *commercial* arbitrations and to leave labor controversies entirely outside its scope. The provision excluding "contracts of employment" was put in §1 to meet the protests of labor unions against enforcement of arbitration by judicial process, and the draftsmen and sponsors of the proposed legislation stated unequivocally that the Act was not designed in any way to cover arbitration of labor disputes. Subsequent proposals for a new act, or for an amendment of the Arbitration Act, to provide for arbitration under labor agreements were never adopted. At the time of its enactment, and for twenty-five years

thereafter, the Arbitration Act was regarded as having no relation to labor and when Congress re-enacted it in 1947 it made no change in its provisions.

The court's conclusion that the term "contracts of employment" refers only to individual contracts of hire, and is not apt language to apply to collective agreements, ignores the history and purpose of the exclusionary clause. The term has been used popularly and in judicial decisions, by this Court as well as others, to describe union agreements.

The Court's further conclusion, that a collective agreement, although not a "contract of employment", is a contract "evidencing a transaction involving commerce", and thus enforceable under § 2, equally ignores the fact that Congress was referring to *commercial* transactions in the Arbitration Act. If the former phrase is not apt language to describe a collective agreement, the latter phrase is certainly far less apt. The court applied a strict standard of verbal accuracy in construing § 1 and a lax standard in interpreting § 2.

The exclusion from § 1 of collective agreements is not limited to transportation workers or those engaged directly in the channels of interstate commerce. The exclusion is as broad as the coverage of § 2. There is no reasonable basis for concluding that Congress intended to distinguish between classes of workers, to include certain collective bargaining agreements within the Act, but not others. As the history of the exclusionary clause clearly establishes, its purpose was to insure that no labor agreements of any sort should be within the Act.

In holding that the arbitration agreement in question, if valid under §§ 1 and 2 of the Act, could be enforced in this action by virtue of the provisions of § 4 of the Act, the Court overlooked the provision of § 4 that only a district court which "save for such agreement" to arbitrate would have jurisdiction under "Title 28" can exercise the powers conferred by that section. In the present action the district court had no jurisdiction, apart from the agreement to arbitrate, over the subject matter of the controversy since neither diversity of citizenship nor a case arising under the laws of the United States is involved.

Congress has repeatedly declined to provide for judicial enforcement of labor arbitration agreements although it has considered the problem on several occasions since 1925. In the face of such Congressional inaction, courts should not resort to a strained statutory construction in order to force arbitration of labor agreements into the mould of an Act designed solely to meet commercial and mercantile needs. Whether labor agreements should be enforced by the courts, and if so, what type of procedural framework should be utilized in labor arbitrations, are matters which properly should be left to legislative consideration.

II. The common law rule which has prevailed in both the federal and state courts was that agreements to arbitrate would not be specifically enforced. Congress on several occasions—and most recently in connection with the Labor Management Relations Act itself—considered, and decided against, proposals which would have provided a procedure for compelling performance of labor arbitration agreements. In view of Congress' repeated refusal to change this long-standing judicial

rule and the clearly expressed intention of Congress that § 301 was not to open the federal courts to remedies not previously available, § 301 cannot be said to have extended the jurisdiction of the federal courts to actions seeking specific enforcement of arbitration agreements. But even if the federal courts would have jurisdiction of such an action, the substantive law applicable to the claim for relief—whether state or federal law applies—bars the relief sought. Furthermore, the union in this case is seeking to vindicate personal rights of the employees involved and is therefore barred by the holding of this Court in *Ass'n of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 43 (1955).

III. Since the instant case arose out of and involved a controversy between the Union and the Company over the terms and conditions of employment of two employees, it constituted a "labor dispute" under the Norris-LaGuardia Act. A federal court, therefore, had no jurisdiction to enforce arbitration by injunctive process except upon the conditions set out in §7 of the Act. Admittedly those conditions were not met in the present case. Although correctly holding that the relief sought was an "injunction" within the meaning of that section, the court below held that the section was not a bar to injunctions against breaches of contract because it applied only to "unilateral coercive conduct", such as involved in strikes and picketing. That ruling ignores the unequivocal language of §7 which, with other sections of the Act, reflects Congress' firm purpose to take the federal courts entirely out of the business of issuing injunctions in the whole field of labor controversies except in the very limited instance of destructive violence defined in §7. It also runs counter

to a long line of decisions which have applied the section in actions by unions and employees, as well as employers, to enjoin breaches of contract and other non-coercive conduct. The practical effect of limiting §7 to injunctions against coercive conduct is to make arbitration agreements specifically enforceable only against employers. Since §4 of the Act absolutely bars any injunction against a strike, a union is always free to strike if it does not choose to arbitrate, or if the arbitrator's award is not to its liking. Moreover, the court's construction of §7 opens up the whole field of collective agreements, except no-strike clauses, to policing by injunctive process. Yet in enacting the Labor-Management Relations Act of 1947, Congress, after consideration, refused to lift the bar of the Norris-LaGuardia Act in actions to enforce collective agreements. The social desirability of empowering courts to enjoin breaches of labor contracts is clearly a matter of policy for the legislature to determine. The decision of the court below not only results in inequity but is at variance with the policy of Congress as expressed in both the Norris-LaGuardia and Labor-Management Relations Acts.

ARGUMENT

I.

THE RESPONDENT IS NOT ENTITLED TO RELIEF ON THE BASIS OF THE UNITED STATES ARBITRATION ACT.

A. *Arbitration Provisions in Collective Bargaining Contracts Do Not Come Within the Terms of §§ 1 and 2 of the United States Arbitration Act.*

The court below held that the provision for arbitration contained in the Agreement between the Union and

the Company was in a contract "evidencing a transaction involving commerce" within the meaning of § 2 of the Arbitration Act, and that it was not excluded from the Act as a "contract of employment" of "workers engaged in foreign or interstate commerce" within the meaning of § 1.

As to the first point, it is difficult to determine the basis for the court's conclusion. The court conceded it was "not usual" to refer to a labor contract as "evidencing a transaction" (R. 75), and that the contract did not consummate the employment relationship, which, it might be argued, constituted a "transaction" (R. 75). Nevertheless it held that the agreement in question was within § 2 because it clearly "involved commerce" (R. 76), apparently regardless of whether or not it "evidenced a transaction".

On the second point, the court's holding is, with a single exception, contrary to the position taken by the Court of Appeals of every circuit which has faced the problem.[1] Although conceding that the words "contract of employment" did not have a "plain meaning"

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[1] *Signal-Stat Corporation* v. *Local 475, United Electrical, Radio & Machine Workers,* 235 F. 2d 298 (2d Cir. 1956); see *Shirley-Herman Co.* v. *International Hod Carriers, etc., Union,* 182 F. 2d. 806, 809, (2d Cir. 1950); *Amalgamated Ass'n* v. *Pennsylvania Greyhound Lines, Inc.,* 192 F. 2d 310 (3d Cir. 1951); *Pennsylvania Greyhound Lines, Inc.* v. *Amalgamated Ass'n,* 193 F. 2d 327 (3d Cir. 1952); *United Electrical, Radio & Machine Workers* v. *Miller Metal Products, Inc.,* 215 F. 2d 221 (4th Cir. 1954); *United Furniture Workers* v. *Colonial Hardwood Flooring Co.,* 168 F. 2d 33 (4th Cir. 1948); *Lincoln Mills of Alabama* v. *Textile Workers Union,* 230 F. 2d 81 (5th Cir. 1956); see *Mercury Oil Co.* v. *Oil Workers Int'l Union,* 187 F. 2d 980, 983 (10th Cir. 1951); *contra: Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, etc., Local 327,* 217 F. 2d 49 (6th Cir. 1954); *Local 19, Warehouse etc. Workers Union* v. *Buckeye Cotton Oil Co.,* 236 F. 2d 776 (6th Cir. 1956).

(R. 77) or a "fixed technical definition" (R. 76), it concluded that since they were more familiar today (whatever they may have been in 1925) as the equivalent of an individual "contract of hire", they should not be interpreted as embracing union-negotiated collective agreements. Brushing aside legislative history, the court felt free to hold that collective agreements were covered by the Act.

Since, as the court noted, the language of §§ 1 and 2 is, at best, "not usual terminology" (R. 75) and somewhat "enigmatic" (R. 76), it is peculiarly appropriate, in determining the meaning of the Act, to consider it in its historical setting and with reference to its legislative history. See, *e.g.*, *United States* v. *American Trucking Associations,* 310 U.S. 534, 543-544 (1940); *United States* v. *Public Utilities Commission,* 345 U.S. 295, 315-316 (1953); *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144, 154 (1932). So considered, there can be no doubt that it was intended to be confined to commercial arbitrations and to leave controversies arising under collective agreements entirely outside its scope. The court below, we submit, either misconceived, or was not fully aware of, the history—which clearly evidences a purpose to exclude all labor contracts and disputes from the Act.

The advocates of the Arbitration Act were concerned with overturning the rule, "long embedded in the decisions of the federal, as well as state and English courts" (R. 72), which denied specific enforcement of agreements to submit to arbitration. The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar As-

sociation,[2] acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration". 45 A.B.A. REP. 75 (1920)[3] In December 1922, the committee's draft of the federal act was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 CONG. REC. 732, 797 (1922)

As it then stood, § 2 of the bill made valid and enforceable written "provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce", and § 1 contained no exclusionary language. The bill, in this form, came to the attention of Andrew Furuseth, President of the International Seamen's Union of America, who strongly objected to it as a "compulsory labor" bill and submitted the specific grounds for his disapproval in a lengthy analysis to his Union at its twenty-sixth annual convention. *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 203 (1923). His opposition rested upon its possible effect not only on arbitration clauses in seamen's individual contracts of hire, but also on the arbitration clauses which were already prevalent in that industry's

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[2] A detailed history of the American Bar Association's efforts in this regard, not repeated here, is set forth at 50 A.B.A. REP. 356-362 (1925).

[3] The Committee also drafted a proposed uniform state act (46 A.B.A. REP. 355 (1921)) and a form of treaty "for the purpose of making effective international commercial arbitration agreements" (47 A.B.A. REP. 294 (1922)), the adoption of which, in conjunction with the proposed federal act, would, in the Committee's view, "enable businessmen to settle their disputes expeditiously and economically". *Id.* at 295

union-management collective agreements.[4] In his analysis of the bill, after discussing its effect upon individual contracts of hire, he went on:

> "So far we have dealt with the individual. What about those who shall seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those organizations save not only the individuals but themselves?
>
> "The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound." *Id.* at 204.[5]

Protests against the bill were also made by the American Federation of Labor. *See Proceedings of the 45th Annual Convention of the American Federation of Labor* 52 (1925). Representatives of the Federation later explained that the basis for labor's fear of the bill was the danger of powerful interests compelling weaker interests to submit to terms of arbitration by which decisions would be practically under the control of the more powerful parties. See 53 A.B.A. REP. 351-352 (1928).

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[4]Three of the International Union's largest District Unions had collective agreements containing arbitration clauses—*i.e.*, the agreements of the Eastern Gulf Sailors' Association, the Marine Firemen's, Oilers' and Watertenders' Union of the Atlantic and Gulf, and the Marine Cooks' and Stewards' Association of the Atlantic and Gulf. *Proceedings of the 24th Annual Convention of the International Seamen's Union of America*, 186, 190, 191 (1921).

[5]In the course of the discussion of Furuseth's analysis, other speakers at the convention opposed the bill. See, *e.g.*, the remarks of Mr. Flynn, Chairman of the Committee on Resolutions. *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 83-84 (1923).

At that time, unions in many trades and industries, in addition to the seamen, had collective agreements containing arbitration clauses.[6] Under the existing law, however, such arbitration machinery could not be enforced against them. The very recent experience of unions in 1920, 1921 and 1922 in the coal mining, building trades and other fields, with adverse arbitration awards leading to strikes, doubtless tended to diminish labor faith in voluntary arbitration. See WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 35-36 (1952). At the same time, unions were fighting against various proposals and instances of compulsory arbitration, such as that embodied in the Kansas Industrial Relations Court Act of 1920. *Id.* at 39-43. Under such circumstances, it is not surprising that labor was opposed to accepting the entirely radical notion of enforcement of arbitration clauses by judicial process. Moreover, the period was one of growing labor distrust and hostility toward the equitable powers of the federal courts, stemming from the extensive use of federal injunctions in strikes, federal decisions cutting down the protection of §20 of the Clayton Act, and court enforcement of "yellow dog" contracts. The attitude of labor was well summarized in an article by a spokesman for the American Federation of Labor (19 *American Federation of Labor Weekly News Service*, No. 5 (1929)) in stating: "If equity courts are empowered to enforce arbitration awards, the bars are thrown down for judge-controlled

[6]Such provisions were prevalent, for example, in the collective agreements of the garment workers, electrical workers, machinists and mine workers, teamsters, and boot and shoe workers. See 53 A.B.A. REP. 359 (1928); MILLIS AND MONTGOMERY, ORGANIZED LABOR 708-713 (1st ed. 1945); WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 23-26 (1952); Oliver, *The Arbitration of Labor Disputes*, 83 U. OF PA. L. REV. 206, 213-214 (1934).

unions". A federal act, making arbitration agreements enforceable in equity in the federal courts, was certain to encounter strong labor opposition at that time. In *Amalgamated Association v. Pennsylvania Greyhound Lines,* 192 F. 2d 310, 313 (3d Cir. 1951), the Court noted the "Widespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed"; and went on to say: "For Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining . . . would have created pointless friction in an already sensitive area. . . ."

Accordingly, at the hearing on the proposed Arbitration Act before the Senate subcommittee to which the bill had been referred, Mr. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade and Commercial Law, after referring to the objections of the Seamen's Union, took pains to make it clear that "It was not the intention of this bill to make an industrial arbitration *in any sense*", and added:

> ". . . and so I suggest that in as far as the committee is concerned, if your honourable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce'. *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the *merchants* the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. *Now, that is all there is in this.*" *Hearing before a Subcommittee of the Com-*

mittee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923). (emphasis supplied)

In the course of the hearing, Senator Sterling, the subcommittee Chairman, referred to the exclusionary clause proposed by Mr. Piatt as

> ". . . your suggested amendment in regard to *the labor associations;* that they shall not be considered." *Id.* at 10 (emphasis supplied).[7]

In December 1923, at the next session of Congress, the bill was reintroduced in both the House and Senate, but this time the first section of the bill contained the exclusionary language which had been proposed at the subcommittee hearing, and which presently appears in § 1 of the Act; and, in the definition of "maritime transaction" in § 1, the words "seamen's wages", which had originally been included, were deleted. *Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646* (68th Cong., 1st Sess.) 2 (1924). The subject matter of the committee hearing on the bills was described as "Arbitration of Interstate Commercial Disputes" (*Id.* at 1), and page after page of the printed record of this hearing reflects the commercial nature of the bill. Over seventy commercial organizations—trade associations, chambers of commerce and bankers' associations —which had endorsed the bill were represented at the

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[7]See also the letter by Secretary of Commerce Hoover to Senator Sterling, Chairman of the Senate subcommittee, dated January 31, 1923, the day of the hearing. HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY ON S. 4213 AND S. 4214, 67th Cong., 4th Sess. 14 (1923). Hoover called attention to "The urgent need of a Federal commercial arbitration act", and, in an effort to speed the passage of the bill and eliminate objection in the broad field of "workers' contracts", he suggested amending the Act by insertion of the present exclusionary language of § 1.

hearing. But not a single labor union appeared, nor was there any testimony or suggestion by anyone that the bill was intended in any way to apply to union agreements. Both the House and Senate reports on the bill are equally devoid of any indication that arbitration of labor disputes was in any way to be included. H.R. REP. No. 96, 68th Cong., 1st Sess. (1924); SEN. REP. No. 536, 68th Cong, 1st Sess. (1924). Indeed, the Senate Committee, by amendment, narrowed the provision of § 2 by substituting for the broader provision "*any contract* or maritime transaction or transaction involving commerce" the present phrase "maritime transaction or *contract evidencing a transaction* involving commerce".

On the floor of Congress, the sponsors of the legislation similarly pointed to the bill's commercial character. Thus, Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

> "This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement *in commercial contracts* and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.
>
> * * * * * *
>
> It creates no new legislation; grants no new rights, except a remedy to enforce an agreement *in commercial contracts* and in admiralty contracts." 65 CONG. REC. 1931 (1924). (emphasis supplied)

And later, Congressmen Mills of New York, who had introduced the bill in the House, in response to a request for an explanation of its provisions, said:

> "This bill provides that where there are *commercial contracts* and there is disagreement under the contract, the court can force an arbitration agreement in

the same way as other portions of the contract." 65 CONG. REC. 11080 (1924) (emphasis supplied).

The very year after the enactment of the Arbitration Act, Congress provided in the Railway Labor Act for voluntary submission of disputes to arbitration. 44 STAT. 577 (1926) There it carefully set up the machinery and procedure for submission, but expressly provided that failure to arbitrate shall not be "a violation of any legal obligation". 44 STAT. (1926), 45 U.S.C. § 157 (1946) If collective agreements covering railway workers were already within the scope of the Arbitration Act, the emphasis in the Railway Labor Act upon the complete freedom to submit to, or to reject, arbitration seems anomalous.

As enacted, the Arbitration Act, with the exclusionary language in §1, was generally considered by the business, legal and labor interests who had been most concerned with it as not in any way relating to labor or covering union contracts. Thus, in 1925, the executive council of the A.F. of L., in referring to the Act in its annual report, stated:

> "Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes." *Proceedings of the 45th Annual Convention of the American Federation of Labor* 52 (1925)[8]

[8]The report of the A.F. of L.'s Committee on Legislation commended the executive council "for having clarified this legislation in the manner stated" and recommended that the "judicial interpretation" of this law be observed "in order that its intent shall not be misconstrued to the disadvantage of labor." *Id.* at 172.

Moreover, in 1926, one year after the Act's passage, the American Bar Association's Committee on Commerce, Trade and Commercial Law, which had drafted and sponsored the Act, began work upon a new bill which *would* apply in the labor field. Noting that "Congress has already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration", the Committee stated that it was "convinced that a similar statute may properly be enacted by Congress providing for the settlement in like manner of industrial disputes . . ." 51 A.B.A. REP. 394 (1926). After two years, during which the Committee held public hearings and conferred extensively with representatives of business, of labor and of governmental agencies, it submitted a draft of a bill, to make enforceable written agreements made "by an employer or organization of employers with an organization of employees" to submit to arbitration disputes "concerning terms of employment or conditions of labor". 53 A.B.A. REP. 376 (1928) Pointing out that labor opposition, which had led to the exclusionary language in the Arbitration Act, had prevented "application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy" (*Id.* at 351), the Committee stressed the necessity of taking into account this "state of mind on the part of the workers of the country" in any effort to frame a statute dealing with "arbitration of industrial disputes." *Id.* at 352. The Committee's proposal for labor arbitration was not acceptable to labor, to whom it smacked of injunctions, and in 1929 President Green of the American Federation of Labor denounced the measure. 19 *American Federation*

of Labor Weekly News Service, No. 5. (April 13, 1929).[9] Accordingly, the Committee concluded, in 1930, that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time". (55 A.B.A. REP. 328 (1930)).

In 1942, a proposal was again made for legislation to provide judicial enforcement of arbitration clauses in collective agreements. Again the proposal was not adopted. A bill, drafted by Professor Sturges, Chairman of the American Arbitration Association's law committee, to amend the Arbitration Act was introduced in the Senate (S. 2350, 77th Cong., 2d Sess.). 88 CONG. REC. 2071. Among other things, the bill struck out the exclusionary language of § 1 of the Act and contained a new § 2A expressly covering the enforcement of arbitration agreements between labor organizations,

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[9]This article in the Federation's *Weekly News Service* entitled "A.F. of L. Executive Dodges Lawyers' Injunctions Trap", attacked in very strong terms the proposal to provide for enforcement of arbitration by equity courts. In part, the article stated:

"The lawyers' proposal appears innocent, but it cannot stand analysis. To say that a wage arbitration award is identical to arbitration of an interpretation of a contract between two businessmen is to revive the discarded theory that labor is a commodity.

.....

"Arbitrators have been known to wander far afield in their decisions, and it is not too much to say that this inclination would be strengthened if courts were empowered to enforce the award and this type of arbitrator knew workers were helpless.

.....

"When an equity court is given jurisdiction the worker is helpless. The court is ruled by his conscience. He has a free hand to exploit his prejudices and his economic views.

"The lawyers' proposal will be dressed up in a garb that is pleasing to the eye, but behind the scenes loom equity judges who await a legislative order that will enlarge their jurisdiction over workers."

or representatives of employees, and employers. In an explanatory statement accompanying the bill, it was stated that the purpose of the proposed amendment was "extension of the act to embrace written agreements to arbitrate labor controversies" (88 CONG. REC. 2072).[10] The bill, however, was never reported by the Committee.

Thus, at the time of the enactment of the Arbitration Act, and for years afterwards, it was well understood that collective bargaining agreements were excluded from its operation. When in 1947 Congress re-enacted the Act, without change, into positive law, as Title 9 of the United States Code,[11] the only existing judicial construction of § 1 of the Act was in accord with this long-continued understanding that the Act did not apply to union agreements. *Gatliff Coal Co.* v. *Cox,* 142 F. 2d 876 (6th Cir. 1944). Indeed, not until 1950, did any court hold that the Act did not really mean what everyone for twenty-five years had supposed that it did mean. *United Office Workers* v. *Monumental Life Ins. Co.,* 88 F. Supp. 602 (E.D. Pa. 1950)

Despite this history, which makes it evident that Congress intended to exclude union agreements from the Act, the court below reached a contrary conclusion. The language of the Act does not compel any such re-

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[10]The statement continued:

"Just as the present act was designed to overcome the common-law rules of 'revocability' and 'nonenforceability' of written agreements to arbitrate commercial controversies arising between the parties, so by section 2A, as proposed, would the act be extended to written agreements to arbitrate labor controversies."

[11]In reporting the Bill, the House Committee on the Judiciary said: "No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill." H.R. REP. No. 255 on H.R. 2084, 80th Cong., 1st Sess. (1947).

sult. Indeed, the court conceded that the words "contract of employment" in § 1 "do not have a 'plain meaning' " (R. 77) and are not a term of art with "a fixed technical definition" (R. 76). Nevertheless, it held that the words are not "apt language" to exclude collective agreements. From the standpoint of modern labor terminology, it may be that the phrase "contract of employment" is today more familiar as the equivalent of an individual contract of hire than of a union collective agreement (R. 76). But the term has not infrequently been used by courts and others in reference to what we now refer to as "collective bargaining contracts". Such union contracts have, for example, been variously described as "contracts of employment", *Goyette* v. *C. V. Watson Co.*, 245 Mass. 577, 587, 140 N.E. 285, 288 (1923), "employment contracts", *Florestano* v. *Northern Pacific Ry,* 198 Minn. 203, 206, 269 N.W. 407, 408, (1936); 63 C.J. 672-673), and "working agreements", *O'Keefe* v. *Local 463, United Ass'n of Plumbers and Gas Fitters,* 277 N.Y. 300, 302, 14 N.E. 2d 77 (1938). Even as late as 1939, this Court, in the course of discussing the purposes of the National Labor Relations Act, referred to collective bargaining contracts as "employment contracts":

> "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that *employment contracts* binding on both parties should be made." *N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U.S. 332, 342 (1939) (emphasis supplied).

And that characterization of collective bargaining agreements as "employment contracts" was quoted in full in the Senate Committee report on the Labor

Management Relations Act. (SEN. REP. No. 105, 80th Cong., 1st Sess. 15 (1947)).

The foregoing demonstrates the accuracy of the Third Circuit's comment with respect to the phrase "contracts of employment" that: "Its adoption to comprehend collective bargaining agreements is not less familiar in judicial usage than in general parlance". *Amalgamated Association* v. *Pennsylvania Greyhound Lines,* 192 F. 2d 310, 313 (3d Cir. 1951). It likewise supports the view so recently expressed in this Court, where, after noting the varying theories as to the legal relations created by a collective contract, it was said that "Evidence is wholly wanting that Congress was aware of the diverse views taken of the collective bargaining agreement . . . ." *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 456 (1955). There is simply no basis upon which one can attribute to Congress in 1924 the intention to draw the careful distinction between "contracts of employment" and "collective bargaining agreements" which this Court itself felt it important to explain twenty years later in *J. I. Case v. NLRB,* 321 U.S. 332 (1944).

Moreover, the technical interpretation of the exclusion clause adopted by the court below strips it of much practical significance. The Act's coverage is limited by § 2 to *written* arbitration provisions. Yet such written provisions were in 1925, and are now, usually found in collective agreements, not in individual contracts of hire—for usually only a union has the bargaining power to secure them. Then, as now, little was involved in the individual contract of hire "except the act of hiring". *J. I. Case Co.* v. *NLRB, supra* at 335.

In striking contrast to the court's narrow construction of the words "contracts of employment" in § 1 is its treatment of the term "contract evidencing a transaction involving commerce" in § 2. If, as the court states, the former phrase is not apt language to describe a collective agreement (R. 74), then the latter phrase is certainly far less apt. Indeed, the court conceded that the latter phrase is "not usual terminology" (R. 75) to describe an agreement between a union and an employer establishing hours, rates of pay and working conditions. But, in this instance, it decided to apply a more lax standard of verbal accuracy and expanded § 2 to cover such agreements.

In so doing it ignored the fact that the sponsors of the Act and Congress were thinking exclusively of *commercial* "transactions"—"The farmer who sells his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." JOINT HEARINGS BEFORE THE SUBCOMMITTEES OF THE COMMITTEES ON THE JUDICIARY ON S. 1005 AND H.R. 646, 68th Cong., 1st Sess. 7 (1924). As we have shown, in the Act as originally drawn § 2 applied to arbitration provisions, not only in any "maritime transaction" and "transaction involving commerce," but also in any "contract . . . involving commerce". Accordingly, the bill was susceptible of the interpretation that it applied, in terms, not only to commercial transactions but to any type of contract, including labor contracts, as well. Union opposition led to the insertion of the exclusionary language in § 1. The additional change in § 2 of the phrase "contract . . . involving commerce" to "contract evidencing a *tran-*

saction involving commerce" further emphasized the exclusively commercial and mercantile character of the situations to which the Act was intended to apply. A collective bargaining contract—if it "evidences a transaction" at all—does not evidence the type of "transaction" to which Congress had reference.

Apparently the Court below felt that the decision of this Court in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956) compelled the conclusion that such an agreement did "evidence a transaction" (R. 75). Such an interpretation of the *Bernhardt* case is not justified. This Court did not pass on the question whether the employment contract there in question "evidenced a transaction" since there was no showing that it "involved commerce". Moreover, as the court below itself noted (R. 75), in that case the individual employment contract did "consummate the employment relationship" or act of hiring, which might be considered a "transaction", whereas the collective agreement here does not even "evidence" that type of "transaction".

It may be urged by the respondent that even if the agreement here in question is a "contract of employment" within the meaning of § 1 of the Act, it does not relate to "workers engaged in foreign or interstate commerce", since the latter phrase applies solely to transportation workers. Such was the novel view adopted in *Tenney Engineering Inc.* v. *United Electrical, Radio & Machine Workers*, 207 F. 2d 450 (3d Cir. 1953) and *Signal-Stat Corporation* v. *United Electrical, Radio & Machine Workers*, 235 F. 2d 298 (2d. Cir. 1956). The rationale of those cases was that since the exclusionary,

language of § 1 specifies two classes of workers in the transportation field—*i.e.* "seamen" and "railroad employees"—the additional phrase "any other class of workers" was intended to mean any other class of *transportation* workers, and that this interpretation is supported by the words "in commerce"—as opposed to such terms as "affecting commerce" or "engaged in the production of goods for commerce".[12] So interpreted, the Act would confine the exclusion to collective contracts of those "acting directly in the channels of commerce itself". *Tenney Engineering, Inc.* v. *United Electrical, Radio & Machine Workers, supra,* at 453.

Such a construction is clearly unwarranted. It means that Congress included certain collective agreements in the Act but not others. That view is contrary to the history of the Act and to common sense. There is not a single indication that either the draftsmen or sponsors of the Act or Congress itself intended to make nice distinctions between various classes of workers. On the contrary, as we have shown, the exclusionary language was inserted in response to union objections and was designed to eliminate the Act's application to *any* type of labor dispute. There is no reason to believe, and nothing to show, that Congress intended the exclusionary clause in § 1 to have a coverage less extensive than that of § 2. *United Electrical, Radio & Machine Workers* v. *Miller Metal Products, Inc.*, 215 F. 2d 221, 224

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[12]This phraseology may be a term of art today, but there is no basis for contending that it was such in 1925, long before the precise distinctions between "affecting commerce," "in commerce," and "engaged in the production of goods for commerce" were introduced by this Court. Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 597-8 (1954)

(4th Cir. 1954). The suggestion that the reason for the exclusion of collective agreements of transportation workers is to be found in the fact that they were already covered by statutory provisions for arbitration (see *Tenney Engineering, Inc.* v. *United Electrical, Radio & Machine Workers*, *Supra*, at 452) is insupportable. No statutory provisions relating to arbitration had been enacted covering the transportation industries which the *Tenney* case held to be embraced in the phrase "any other class of workers".[13] And the then existing statutory provisions for "railroad workers" had no application to enforcement of arbitration clauses of collective bargaining agreements.[14]

It has been urged by some that even a strained construction of the Arbitration Act is warranted to accomplish a result in furtherance of what is assumed to be a widely accepted policy in favor of judicial enforcement of arbitration in labor disputes. So far as Congress is concerned, it has never expressed such a policy. It did not do so in enacting the Arbitration Act, or the Rail-

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[13]As one commentator points out, "[t]here was no risk of duplication" as to "truckers, many maintenance groups, employees engaged in ordering and paying for interstate shipments, warehouse employees where the interstate transit has not ended, etc." Cox, *Grievance Arbitration in the Federal Courts;* 67 HARV. L. REV. 591, 599-600 (1954)

[14]The Newlands Act of 1913 applied only to a voluntary submission to arbitration of an existing dispute. 38 STAT. 103-108 (1913). The Transportation Act of 1920 authorized "Adjustment Boards" and a "Railroad Labor Board," but was not directed toward the enforcement of arbitration provisions in collective bargaining contracts. 41 STAT. 469 (1920). Even the Railway Labor Act of 1926, as amended and in force today (44 STAT. 577, as amended, 45 U.S.C. § 151 *et seq.*), does not provide for enforcement of arbitration clauses in collective agreements covering railroad workers.

way Labor Act, or, as we show (2A, below) in much later statutes. On the contrary, whenever faced squarely with the problem of enforcement of arbitration in the labor field, Congress has never seen fit to provide for it. Nor is there, as some assume, universal acceptance of the notion that in the labor field judicial enforcement of arbitration agreements is necessarily good. Many experienced in that field have expressed the contrary view.[15] And state legislatures have divided on the question.[16]

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[15]Witness the remarks of Professor Shulman, permanent arbitrator under the Ford Motor Company - United Automobile Workers collective agreement:

> ". . . if the collective agreement provides for resort to voluntary arbitration, it is argued that the law should enforce the agreement; and provision is made for suits to enjoin or compel the arbitration or to enjoin or enforce the resulting awards . . . . In my judgment, these are unwise limitations on the parties' autonomy." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1001-1002 (1955).

There is basis for believing that not all sectors of organized labor are in favor of statutory provisions for the *judicial enforcement* of arbitration agreements. For example, in 1940 the A.F. of L. opposed an amendment to the New York arbitration statute which was designed to make labor-management arbitration agreements judicially enforceable; and in 1949 the Illinois Federation of Labor was responsible in large measure for the defeat of a similar proposal before the Illinois legislature. Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 246 (1950).

[16]Some state statutes, for example, expressly excluded arbitration provisions in labor contracts, See *e.g.* OHIO, GEN. CODE ANN. §12148-1 (1938); NEW HAMPSHIRE, REV. LAWS, c. 415 §1, p. 1724 (1941); WIS. STAT. 298.01 (1949); RHODE ISLAND, GEN. LAWS c. 475 §1 (1938); CALIFORNIA, CODE OF CIVIL PROCEDURE §1280 (1941); OREGON, COMP. LAWS ANN. §§11-601 (1940); Pennsylvania, 5 PA. STAT. ANN. 161 (1930); LOUISIANA, REV. STAT. §9: 4216 (1950); others specifically ineluded them, See *e.g.*, NEW YORK, CIV. PRAC. ACT, Art. 84, Sec. 1448; still others were silent on the matter, See *e.g.*, CONNECTICUT, *Gen.* STAT. §8151 *et seq.* (1949); NEW JERSEY, STAT. ANN. §2:40 (1939) HAWAII, REV. LAWS c. 165 §8701 *et seq.* (1945).

But beyond the basic policy question, whether judicial enforcement of labor arbitration is socially desirable, there are serious questions as to the soundness of forcing labor arbitration into a statutory scheme expressly designed for *commercial* needs. As the court below observed: "The comprehensive and consistent scheme that legislative action could afford" is a prerequisite to "effective" and "safeguard" arbitration (R. 73). Whether the United States Arbitration Act, which may effectively meet the requirements of commercial arbitration, is an appropriate and comprehensive vehicle for dealing with labor disputes, raises problems of policy and procedure meriting legislative consideration.

If Congress should determine that judicial enforcement of arbitration clauses in collective contracts is advisable, it might well decide that certain legalistic features of the United States Arbitration Act—such as the subpoena power, depositions, cross-examination, etc.—are inappropriate to the purposes of a labor arbitration.[17] It might explore the feasibility of the Act's present provision for the appointment of an arbitrator by the court, where the parties have not provided a method of selection, a provision which some believe "runs counter to prevailing labor-management prejudices concerning arbitration." (Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 265 (1950)); or even conclude that the National Labor Relations Board, not a federal

[17]This criticism has been directed at the recently proposed Uniform Arbitration Act, and is applicable to the present federal Act as well. See Syme, *Voluntary Labor Arbitration Is Threatened*, 7 Labor Law J. 142 (1956). The author also states:

> "It is a total misconception of labor arbitration to have it coupled with commercial arbitration. The two are similar in name, but there the similarity ends."

court, is the appropriate tribunal for the enforcement of labor arbitration agreements. Gregory and Orlikoff, *supra* at 267. It might provide for the enforcement of agreements to arbitrate the terms of a future collective agreement (see *Boston Printing Pressmen's Union* v. *Potter Press Co.*, 141 F. Supp. 553 (D. Mass. 1956); *cf.* §2A of the 1942 American Arbitration Association bill, 88 CONG. REC. 2073 (1942)); or treat with the problem of enforcing an arbitration agreement where the union has simultaneously called a strike (see R. 68); or determine the extent to which the federal statute should pre-empt the field (see §1 of the 1942 American Arbitration Association bill, 88 CONG. REC. 2073 (1942)); or spell out the rights and obligations of individual union members with respect to the arbitration agreement and the award (Gregory and Orlikoff, *supra* at 265); or provide for the enforcement of arbitration agreements between unions themselves—another suggestion of the American Arbitration Association's 1942 bill. 88 CONG. REC. 2072 (1942).

These, and other considerations, could be weighed if solution of the problem of enforcement of labor arbitration is left to the legislature—where it belongs. They are entirely outside the range of courts. The cause of good labor-management relations, we submit, is not served in the long run by judicial attempts to enforce labor arbitration by straining an old statute, devised for commercial purposes, to fit what a court thinks ought to be current legislative policy.

B. *By Virtue of § 4 of the Arbitration Act, A Federal Court Has No Power to Direct Arbitration of Individual Employee Grievances In An Action Based On § 301 of the Labor Management Relations Act.*

Even if it be assumed that the agreement to arbitrate here in question was a valid and enforceable contract under §§ 1 and 2 of the Act, the court below was wrong in holding that the district court had power in the present action to compel arbitration under § 4. That section, and the following sections, provide the machinery by which the type of arbitration contracts defined in §§ 1 and 2 may be enforced. § 4 authorizes the issuance of orders directing arbitration under a written agreement by "any United States district court which, *save for such agreement, would have jurisdiction under Title 28,* in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties". (Emphasis supplied).

Under this section a district court may compel arbitration only if it would have had jurisdiction under Title 28 *had there been no agreement to arbitrate.* The court's jurisdiction must be tested, therefore, just as if no arbitration agreement had existed.

Both § 4 and § 8 of the Act make it certain that it is the underlying controversy, rather than the refusal to arbitrate itself, which provides the jurisdictional test. § 4 itself refers to the method for hearing "if the *matter in dispute* is within the admiralty jurisdiction". And § 8, in stating that "*If the basis of jurisdiction* be a cause of action otherwise justifiable in admiralty...", likewise makes clear that jurisdiction cannot be based

on the controversy arising from the refusal to arbitrate. Thus, throughout the statute, it is the underlying controversy between the parties which either provides, or fails to provide, the basis for federal jurisdiction.

In the present case, the subject matter of the controversy between the union and the company was whether the employee Boiardi had been paid at the proper rate and whether the employee Armstrong had been improperly discharged. The question, therefore, is whether the district court had jurisdiction over those disputes, under Title 28.

In holding that the requirements of § 4 of the Act were satisfied, the court below completely overlooked the requirement that the district court's jurisdiction must be founded on Title 28. Unless the complaint affirmatively establishes the facts necesary to create jurisdiction on one of the grounds enumerated in Title 28, a federal court has no power to order arbitration under § 4. *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees* v. *Southern Bus Lines, Inc.*, 189 F. 2d 219 (5th Cir. 1951); *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955); see *Mengel Co.* v. *Nashville Paper Products & Specialty Workers Union*, 221 F. 2d 644, 648 (6th Cir. 1955); *Krauss Bros. Lumber Co.* v. *Louis Bassert & Sons, Inc.*, 62 F. 2d 1004, 1006 (2d Cir. 1933); *San Carlo Opera Co.* v. *Conley*, 72 F. Supp. 825, 828 (S.D.N.Y. 1946), *aff'd* 163 F. 2d 310 (2d. Cir. 1947).

Although Congress provided in § 301(a) of the Labor Management Relations Act that actions for breach of collective agreements may be brought in the federal courts without regard to diversity of citizenship or

amount in controversy, it did not see fit to extend the provisions of § 4 of the Arbitration Act to such actions. The same Congress which enacted the Labor Management Relations Act, codified and reenacted the Arbitration Act without changing the then existing requirement that to exercise the powers under § 4 a district court must have jurisdiction "under the judicial code at law, in equity or in admiralty" (61 Stat. 669, 9 U.S.C. §4). And when seven years later, in 1954, Congress amended § 4 to bring its phraseology into conformity with present terms and practice, by deleting the reference to the "judicial code" and to "law" and "equity", it substituted the phrase "Title 28".

In the instant case the requisites for jurisdiction under Title 28 are not present. Indeed, the sole basis upon which federal jurisdiction was invoked in plaintiff's amended complaint was § 301 of the Labor Management Relations Act (R. 42). The union's belated attempt to amend its complaint in the Court of Appeals so as to claim jurisdiction also under §1332 (a)(1) of Title 28, on the ground of diversity of citizenship (R. 57), was denied by that court because the motion "cannot accomplish the result intended" (R. 82).[18] Hence the district court had no jurisdiction over the controversy on the grounds of diversity.

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[18]Even if there were complete diversity of citizenship between all the members of the plaintiff Union and the defendant, as the Union alleged in its motion to amend its complaint (R. 57), the present action could not be maintained under 28 U.S.C. §1332(a)(1) on grounds of diversity of citizenship, since the plaintiff Union had no capacity to bring the action. Section 17(b) of the Federal Rules of Civil Procedure provides that the capacity of an unincorporated association to sue "shall be determined by the law of the state in which the district court is held" unless it is suing to enforce "a substantive right existing under the laws of the United States". As

Nor can jurisdiction under Title 28 be supported on the theory that the case "arises under the Constitution, laws or treaties of the United States," within the meaning of §1331 of Title 28. The disputes as to whether Boiardi had been properly paid and Armstrong properly discharged involve a question of the interpretation of the collective agreement between the parties. The rights sought to be vindicated are rights created by and arising out of the contract, not federal law. It is well settled that cases involving breaches of a collective agreement do not arise under the laws of the United States simply because the agreement was entered into by parties subject to the National Labor Relations Act,[19] or the Railway Labor Act,[20] or the Labor Management Relations Act.[21] A suit does not arise under a federal

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[19] *Schatte* v. *International Alliance of Theatrical Stage Employees*, 70 F. Supp. 1008 (S.D. Calif. 1947), *aff'd* 165 F. 2d 216 (9th Cir. 1948), *cert. denied* 334 U.S. 812 (1948); *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees* v. *Southern Bus Lines, Inc.*, 189 F. 2d 219 (5th Cir. 1951).

[20] *Starke* v. *New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir. 1950); *Barnhart* v. *Western Maryland Ry. Co.*, 128 F. 2d 700 (4th Cir. 1942), *cert. denied* 317 U.S. 671 (1942); *Burke* v. *Union Pacific R. Co.*, 129 F. 2d 844 (10th Cir. 1942); *International Union United Automobile, Etc. Workers* v. *Delta Air Lines*, 83 F. Supp. 63 (N.D. Ga. 1949); see *Cepero* v. *Pan American Airways*, 195 F. 2d 453, 455 (1st Cir. 1952).

[21] *International Ladies' Garment Workers Union* v. *Jay-Amer Co.*, 228 F. 2d 632 (5th Cir. 1956); *Silvertone* v. *Valley Transit Cement Co.*, 140 F. Supp. 709 (S.D. Calif. 1955).

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we show in the body of the Brief, *infra*, the substantive right which the Union is asserting here is a right arising out of a contract, not one created by United States statute. For purposes of determining whether jurisdiction exists under 28 U.S.C. §1332(a)(1) therefore, the law of Massachusetts necessarily governs the question of capacity to sue. Under that law an unincorporated association cannot bring an action. *Tyler* v. *Boot & Shoe Workers Union*, 285 Mass. 54 (1933); *Donovan* v. *Danielson*, 244 Mass. 432 (1923). Accordingly, the district court would have had no jurisdiction on diversity grounds even if the proposed amendment had been allowed.

law unless it "really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law". *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912); *Gully* v. *First National Bank*, 299 U.S. 109, 114 (1936).

Not only did the court below overlook the requirement of § 4 that jurisdiction must be founded on Title 28, it also ignored the provision that jurisdiction is to be tested "save for the agreement to arbitrate". In holding that the complaint in the present action met the terms of §301 (and, therefore, satisfied § 4 of the Arbitration Act), the court found that §301 was complied with because the union sought enforcement of an agreement to arbitrate running to it and not merely relief available to the individual employee (R. 80). But as we have shown, the controversy over the failure to perform a promise to arbitrate cannot be the subject matter of the controversy within the meaning of § 4. It is the underlying dispute, the subject matter of the controversy of which arbitration is sought, that is the test of jurisdiction. Here, the subject matter of that controversy was the rate of pay of one employee and the propriety of the discharge of another. Over that subject matter the district court had no jurisdiction under §301, since it involved "terms peculiar in the individual benefit which is their subject matter" involving the "uniquely personal right of an employee". *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 460, 461 (1955). It follows that even if jurisdiction under § 301 over the subject matter of the underlying dispute would satisfy § 4, such jurisdiction cannot be found in the present case. Accordingly, the district court had no

power under the Act to order arbitration even if the contract in question was made valid and enforceable by §§ 1 and 2 of the Act.

II.

The Court Below Was Correct In Ruling That Section 301 Of The Labor Management Relations Act Of 1947 Cannot Provide The Basis For The Specific Enforcement Of An Executory Agreement To Arbitrate.

If this Court determines that the United States Arbitration Act excludes collective bargaining agreements from its coverage, the judgment of the Court of Appeals in this case must be reversed. For there is no other basis on which arbitration may be compelled. The court below was correct in holding that, in the absence of express statutory direction, an executory agreement to arbitrate cannot be specifically enforced, and that § 301(a) of the Labor Management Relations Act does not provide any such right.

This Court held in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 350 U.S. 437 (1955), that, in view of its language and legislative history, § 301(a) cannot be read to extend the jurisdiction of the federal courts to suits by labor unions seeking to enforce basically personal rights of employees. In the words of Mr. Justice Frankfurter, "Congress did not confer on the Federal courts jurisdiction over a suit such as this one." 348 U.S. at 461. The Chief Justice in his concurring opinion, *ibid*, stated that the only issue before the Court was "one of statutory interpretation," and agreed that Congress did not intend to

make the federal courts available for suits such as that in question.

The issue in the present case is of precisely the same nature as in *Westinghouse:* What is the scope of the extended jurisdiction which Congress intended the federal courts to exercise under § 301? Here, as in *Westinghouse*, the question is whether Congress intended the federal courts to be available for a particular type of action—in this case actions to compel arbitration. The language and legislative history of § 301 are clearer that federal courts were not to be opened to actions of that nature, than with respect to the type of suit involved in the *Westinghouse* case. For in enacting § 301 Congress was operating against a background of a clear federal and state common law rule that arbitration agreements are not specifically enforceable, and of repeated consideration and rejection by earlier Congresses of proposals which would have effected a change in this rule; and nonetheless Congress made it clear that § 301 was not to change this rule—that is was not intended to open the federal courts to a litigant seeking a form of relief previously not available.

A. *As a Matter of Basic Contract Law, Executory Agreements to Arbitrate Are Not Specifically Enforceable.*

It is a fundamental and long-settled principle of contract law that executory agreements to arbitrate future disputes under a contract are not specifically enforceable. RESTATEMENT, CONTRACTS § 550 (1932); 6 WILLISTON, CONTRACTS (Rev. Ed.1938) § 1919. That rule obtains as fully in federal as in state courts. See, *e.g., Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924); *Simmons Co.* v. *Crew*, 84 F. 2d 82 (4th

Cir. 1936) *cert. den.* 299 U.S. 569 (1936); *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d 276, 279-80 (5th Cir. 1947); *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S.D.N.Y. 1915).

There are strong practical reasons for this rule. As the court below pointed out, (R. 73), the courts cannot provide the "comprehensive and consistent scheme that legislative action could afford" with respect to such matters, for example, as stay of court proceedings and procedure for confirming or vacating an award without which any effective enforcement of the agreement to arbitrate must fail.

The only changes in the settled common law rule have been as a result of statutes which by their terms provide for specific enforcement. Several states have provided by statute for the specific enforcement of some types of agreements to arbitrate, although there is no consistent pattern of state legislation on this point. See Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 CHIC. L. REV. 233, 238-45 (1950); 6 WILLISTON, CONTRACTS § 1920 (Rev. Ed. 1938). And Congress itself made certain types of commercial arbitration contracts enforceable through enactment of the United States Arbitration Act.

On the occasions, prior to 1947, when Congress considered arbitration legislation it clearly revealed its judgment that agreements to arbitrate labor controversies should not be specifically enforceable. Thus, labor controversies were excluded from the scope of the United States Arbitration Act. And in 1926, the year after the enactment of the United States Arbitration

Act, Congress provided for voluntary arbitration in the Railway Labor Act. There, it carefully set up the machinery and detailed procedure for arbitration, but expressly provided that failure to arbitrate shall not be "a violation of any legal obligation". (Railway Labor Act, § 7, 44 Stat. 582, as amended, 45 U.S.C. § 157).

The legislative history of the original Wagner Act shows that there was also extensive consideration of the problem of arbitration in both 1934 and 1935. Senator Wagner's original bill, S. 2926, 73d Cong., 2d Sess. (1934), as amended and reported by the Committee on Education and Labor, contained in § 9(a) a lengthy provision providing for administration and enforcement of arbitration agreements by the Labor Board when the parties had voluntarily agreed to submit a labor dispute to it. A similar provision was contained in H.R. 8423, 73d Cong., 2d Sess. (1934). In the 74th Congress, Senator Wagner introduced S. 1958, 74th Cong. 1st Sess. (1935), which continued the provision with respect to enforcement of agreements to arbitrate when submitted to the Board (§ 12). This proposal which would have, in general, paralleled the arbitration provisions of the Railway Labor Act, was dropped from the Senate Bill without explanation, shortly before its passage. S. 1958 (2d Senate print), 74th Cong., 1st Sess. (1935). Similar provisions pertaining to arbitration were considered, but not finally adopted, by the House in H.R. 6187 and H.R. 6228, 74th Cong., 1st Sess. (1935). And again in 1942 Congress had before it a proposal for enforcement of labor arbitration agreements and, as shown above (IA *Supra*,) took no action to do so.

B. *The Language of § 301(a) of the Labor Management Relations Act and the Structure and Legislative History of the Act Show No Intention on the Part of Congress to Have § 301(a) Open the Federal Courts to Actions for the Specific Enforcement of Arbitration Provisions in Collective Bargaining Agreements.*

It is in the context of the unequivocal judicial rule, described above, against the specific enforcement of arbitration agreements and the repeated refusals of Congress to provide for such enforcement in the labor field, that the consideration and enactment of § 301 must be viewed. A legislative decision to provide for such specific enforcement would have been a complete turnabout and one could expect that Congress would have spoken clearly if that had been its intent. On the contrary, the language of § 301 itself, a comparison with other sections of the Act, and the legislative history make it clear beyond a doubt that Congress did not intend to work such a change in the long-settled judicial rule.

1. *The language and context of the section.*

In terms, § 301(a) does not contain any suggestion that the federal courts were being opened to a remedy not previously available—specific performance of arbitration provisions in union contracts. The section contains not a word as to arbitration, enforcement, injunctions or any other new remedy.

The plain and obvious meaning of the words of that section is simply that the federal courts were to be opened to proceedings for violation of collective bar-

gaining contracts regardless of diversity of citizenship or jurisdictional amount, where, prior to § 301(a), those requirements would have barred jurisdiction.[22] The section did not remove these jurisdictional limitations with respect to cases in which prior to its enactment the federal courts could not have provided relief.

This conclusion is reinforced by comparing subsection (a) of § 301 with subsections (b), (c) and (d), where Congress dealt in detail with procedural matters. Thus, subsection (b) provides how a money judgment against a labor organization may be enforced; subsection (c) deals with the venue of suits by or against unions; and subsection (d) with the method of service of process upon unions. Since, in § 301, Congress was focussing its attention upon procedure and remedies, it certainly would have dealt expressly with new remedies had it been its intention to create any.

Examination of the Act as a whole further supports the view that § 301(a) was not intended to give the federal courts jurisdiction over suits to compel performance of labor arbitration agreements. In other sections of the Act, where Congress intended to authorize enforcement by way of an injunction or other

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[22]It has been suggested that the unqualified use of the word "suits" in § 301(a) shows Congress intended to add the new remedy of specific enforcement of arbitration agreements. See *Milk and Ice Cream Drivers Union* v. *Gillespie Milk Prod. Corp.*, 203 F. 2d 650, 651 (6th Cir. 1953). Of course, no such significance can be given to the use of that word. "Suits", for example, was used throughout Section 24 of the old Judicial Code, 36 Stat. 1091 (1911), which conferred jurisdiction on the district courts over "suits of a civil nature, at common law or in equity" in various instances. Yet, as we have shown, the federal courts in exercising their jurisdiction over suits in equity, consistently held that they could not compel specific performance of an executory agreement to arbitrate.

decree, it carefully spelled out the circumstances under which, and the persons by whom, such equitable relief could be obtained. Thus, Courts of Appeal are vested with "power to grant such temporary relief or restraining order" and to make a decree "enforcing" orders of the National Relations Board (§ 10(e), 29 U.S.C. § 160(e)); district courts are authorized to grant a "restraining order" and "injunctive relief" against unfair labor practices upon petition of the Board (§§ 10(j), 10(1), 29 U.S.C. §§ 160(j), 160(1); to "enjoin" certain strikes upon petition of the Attorney General (§§ 208, 29 U.S.C. § 178) and to "restrain violations" of the prohibition against certain payments to labor organizations (§ 302, 29 U.S.C. § 186); and all courts are expressly prohibited from issuing "any process to compel the performance by an individual employee" of labor or services (§502, 29 U.S.C. § 143).

It is far-fetched, to say the least, to suppose that Congress, in the same Act in which it spelled out in this great detail forms of equitable enforcement which were to be available in particular situations, intended the general language of § 301(a) to reverse the long-settled rule with respect to specific enforcement of arbitration provisions. If such had been Congress' intention, it cannot be found in what Congress said.

2. *The legislative history of § 301.*

The *Westinghouse* case traces in detail the legislative history of § 301(a) and § 10 of the so-called "Case bill" from which § 301(a) was largely derived, 348 U. S. 444-449. There is nothing in this history which even remotely suggests that one of Congress' purposes

in enacting § 301 was to extend the jurisdiction of the federal courts to actions seeking specific enforcement of arbitration agreements.

Indeed, far from indicating that § 301 was intended to authorize this form of relief, the legislative history strongly suggests that no equitable remedies of any sort are available under § 301 and that its sole purpose was to authorize damage actions. The reports on the Senate and House bills[23], and the agreements reached in conference[24] all suggests strongly that the only purpose of § 301 was to authorize damage actions. Similarly, in the debates on the bill, members of both houses repeatedly evidenced their persistent belief that the section related only to damage actions.[25]

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[23]SEN. REP. No. 105, 80th Cong. 1st Sess. pp. 15-16 (1947):

"Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law arises from the fact that each individual member of the union must be named and made a party to the suit. • • • Even where unions are suable the *union funds may not be reached for payment of damages* • • •." (Italics supplied)

H. R. REP. No. 245, 80th Cong. 1st Sess. pp. 45-46 (1947).

[24]Senator Taft in explaining to the Senate the agreement reached in Congress stated:

"The provisions of the Senate amendment *which conferred a right of action for damages* upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301)." 93 CONG. REC. 6600 (1947). (Italics supplied)

[25]See, for example, the following:

Representative Case: ". . . Both in the bill last year, and in this Taft-Hartley bill, the language while making labor organizations responsible under their contracts and for the acts of their agents, limits judgments to the assets of the organization itself." 93 CONG. REC. 6438 (1947).

But the issues in the present case make it unnecessary for the Court to pass at this time upon whether § 301 opened the federal courts only to damage actions or whether the federal courts can grant equitable relief in some cases. For the only question here is whether § 301(a) added jurisdiction to grant equitable relief in a situation where it was not available in the federal courts prior thereto.

The legislative history reviewed in the *Westinghouse* case establishes that the jurisdictional requirements of diversity and amount in controversy were removed with respect to claims for relief which the federal courts would have been able to grant but for those requirements—not with respect to new causes of action. Even more significant for purposes of this case is the legislative history which shows that Congress specifically considered and decided against providing for the enforcement of arbitration agreements.

Representative Robison: ". . . the party who is at fault must respond in fair and just damages." 93 CONG. REC. 7506 (1947).

Senator Smith: "whichever side is guilty of violating a contract solemnly entered into shall be responsible for damages resulting from such violation." 93 CONG. REC. 4410 (1947).

Senator Wiley: "Unions should be liable for damages if they break contracts just as businesses are liable." (93 CONG. REC. 5134 (1947).

See also the President's veto message which reflects his understanding that Section 301 was to be limited to damage suits:

"• • • In introducing damage suits as a possible substitute for grievance machinery, the bill rejects entirely the informed wisdom of those experienced in labor relations." 93 CONG. REC. 7501 (1947).

Thus, the original Senate Bill as reported (S. 1126, 80th Cong., 1st Sess.) expressly made it an unfair labor practice for an employer or a labor organization "to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration" (§ 8(a)(6), 8(b)(5)); and empowered the National Labor Relations Board to issue orders requiring any persons to cease and desist from any unfair labor practice (§ 10(c)) and Courts of Appeal to make decrees enforcing such Board orders (§ 10(h))[26].

The House Bill, as passed by the House (H.R. 3020, 80th Cong., 1st Sess.), dealt with the same subject in a slightly different way. It defined (§ 2(11)) the terms "bargain collectively" and "collective bargaining" as meaning, among other things: "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such dispute, following such procedure"; and it made it an unfair labor practice for employers, employees or labor organization "to refuse to bargain collectively" (§§ 8(a)(5), 8(b)(2)).[27]

These provisions, which for the first time would have established a procedure for enforcement of arbitration provisions in labor agreements, were dropped entirely after conference. The House Conference Report. (HOUSE CONF. REP. No. 510 on H.R. 3020, 80th Cong., 1st Sess.) stated:

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[26]This provision was discussed at some length in both the Senate majority and minority reports on the Bill. See SEN. REP. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20, 23 (1947); Minority Report No. 105, 80th Cong., 1st Sess., pp 12, 13 (1947)

[27]See discussion of this proposal in the majority and minority reports on the Bill, House Report No 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 19-21 (1947); House Minority Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 368, 374 (1947).

"In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract"[28] (p. 39).

. . .

"The Senate amendment contained a provision which does not appear in Section 8 of the existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once the parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not to the Labor Relations Board." (pp. 41-42).

As we have already shown, under such "usual processes of law", agreements to arbitrate were not enforceable by an injunction or a decree.

Moreover, both Houses of Congress had before them at the same time proposals for compulsory arbitration in certain labor disputes. Bills to compel arbitration

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[28]See also Senator Taft's explanation of the conference agreement to Senate:

"When the bill passed the Senate it also contained a sixth paragraph in this subsection which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. . . . The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate collective bargaining agreements. 93 CONG. REC. 6600 (1947).

in the event of strikes affecting the public interest were introduced in the House by Representative Case and others (93 CONG. REC. A 1069-1072 (1947)), and Senator Morse proposed amendments to the Senate bill to provide for arbitration in the event of jurisdictional disputes (93 CONG. REC. 1912-1913 (1947)). None of these proposals was adopted.

If one thing is clear, it is that the Congress which enacted the Labor Management Relations Act was fully aware of the problems of arbitration in the labor field, deliberately stopped short of providing enforcement through judicial or other process. Indeed, that very same Congress, at the same session, repealed and reenacted the United States Arbitration Act without change, leaving the express exclusion of labor agreements still in that law. 61 Stat. 669, 9 U.S.C. §§ 1-14 (Supp. 1952).

Thus, for the reasons set forth by Mr. Justice Frankfurter and the Chief Justice in the *Westinghouse* case, the court below was correct in holding that § 301 did not make the federal courts available for the specific performance of agreements to arbitrate. For whether § 301(a) be regarded solely as jurisdictional or as providing both jurisdiction and substantive rights, it is clear that a plaintiff's case is never properly in the federal court if it is not one for which Congress intended § 301 to authorize the federal courts to grant relief. This case, like *Westinghouse,* does not require the Court to consider the constitutionality of § 301 or to face the intricacies of choosing between state and federal law. For here again all that the Court is called upon to decide is whether § 301(a) evidences Congress' intention to open the federal courts to a specific type of case. As in *Westinghouse* every indication of congressional intent calls for a negative answer.

C. *Even if § 301(a) Were Held to Afford the Jurisdiction of the Federal Courts to this Cause of Action, Specific Enforcement of the Arbitration Agreement Would Be Barred whether Federal or State Law Were Held Applicable.*

If the Court should determine that a plaintiff seeking specific enforcement of a labor arbitration agreement is not barred at the threshold of the federal court, the plaintiff must still show that under the applicable law he is entitled to recover in that court.

To the extent federal law is applicable it clearly bars the relief the respondent seeks. The federal rule, as enunciated by Justice Brandeis in *Red Cross Lines* v. *Atlantic Fruit Co.*, 264 U.S. 109 (1924), is clear that the federal courts will not compel specific performance of executory agreements to arbitrate. As shown above, from the United States Arbitration Act in 1925 through the Taft-Hartley Act in 1947, Congress consistently declined to change this rule with respect to labor agreements.

As the court below stated (R. 73), the courts ought not to ignore this long-standing federal rule "without a pretty explicit statutory basis for so doing." Surely they ought not to do so when Congress has repeatedly reaffirmed this rule itself.

If the view is taken that § 301 does something more than expand the jurisdiction of the federal courts, and that it envisions a body of federal substantive law applicable in § 301 cases, this still does not justify the judiciary in overturning that rule. It is one thing to read § 301(a) as authorizing the courts to fill in gaps in the federal statutory law. It is quite another to find

in Congress' repeated decision not to compel labor arbitration an intention that Congress wanted the courts to do an "about face". To do this the Court would have to attribute to Congress an intention it never expressed and which, as the legislative history conclusively establishes, it never entertained.

Such judicial law-making is particularly inappropriate in the field of labor arbitration. For even if the Court should ignore Congress' own policy decision on this matter and overturn the present federal rule, there would still be lacking, as Judge Magruder pointed out (R. 73), "the procedural specifications needed for administration of the power to compel arbitration". And the courts are not the proper arena in which the questions as to what provisions are appropriate in a federal labor arbitration statute should be argued and determined. So basic, complex and far-reaching a change in federal labor policy, if it is to be made at all, should be made by Congress.

If it should be held that under § 301(a) the federal courts are on some matters to look to the law of the states, it nonetheless seems unlikely that the question of the remedies to be given by the federal courts under § 301(a) is to be governed by state law, particularly on a question where, as shown above, there is clear federal law. Cf. *Just* v. *Chambers*, 312 U.S. 383 (1941). But even, if this Court's holding in *Bernhardt* v. *Polygraphic Co.* 350 U.S. 198 (1956), is applicable to cases in which jurisdiction is sought to be based on § 301, and Massachusetts law is therefore applicable, the agreement to arbitrate would still not be enforceable.

Executory agreements to arbitrate were not specifically enforceable at common law in Massachusetts (see *e.g. Rosenblum* v. *Springfield Produce Brokerage* Co., 243 Mass. 111 (1922); *Noyes* v. *Marsh*, 123 Mass. 286 (1877), and the limited statutory provision for the enforcement of arbitration agreements enacted in 1925 (G. L. (Ter. Ed.) c. 251, §§ 14-22) has been narrowly construed to exclude the enforcements of an arbitration provisions like that in issue in this case. See e.g., *Cochrane* v. *Forbes*, 257 Mass. 135, 143 (1926); *Cueroni* v. *Coburnville Garage, Inc.*, 315 Mass. 135, 141, (1943); *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636 (1944). The common law rule was not changed by § 11 of G. L. (Ter. Ed.) c. 150, enacted in 1949. That section provided merely that if the parties agreed that the determination of the arbitrators should be final, "such *determination* shall be . . . enforceable by proper judicial proceedings." (emphasis supplied) It carefully distinguished between judicial enforcement of the executory agreement and of the award which might be rendered pursuant to the agreement. And it did so shortly after the Supreme Judicial Court had squarely reaffirmed the common law rule that an executory agreement in a labor contract was not specifically enforceable. *Sanford* v. *Boston Edison Co., supra,* at 636. What § 11 did was to authorize enforcement of awards, which might otherwise have been unenforceable, by means of remedies previously unavailable. Cf. *Magliozzi* v. *Handschumacher & Co., Inc.*, 327 Mass. 569 (1951). That is something quite different from creating a right to enforcement of the executory agreement itself.

D. *Since This Action Seeks To Enforce Rights Personal To Individual Employees It May Not Be Brought By The Union Under § 301(a).*

There is a further reason for holding that § 301(a) does not authorize specific performance of the arbitration provision here in question. The *Westinghouse* case held that § 301(a) did not authorize suits in the federal courts to enforce the personal rights of employees. What the union seeks to enforce in the present case are the right of Mr. Boiardi to receive a higher rate of pay and the right of Mr. Armstrong to be reinstated after his discharge. These rights are no less personal to the employees because here the union seeks to enforce them by compelling arbitration rather than by a suit for a declaratory judgment as in *Westinghouse*.

The court below distinguished this case from *Westinghouse* on the ground that if suits to compel arbitration were deemed personal to the employee involved, "there would be no significant use a union could make of § 301" (p. 46). This reasoning disregards completely the many provisions of collective bargaining agreement, such as agreements to employ union labor and check-off of dues, peculiar in interest to the union itself.

In the *Westinghouse* case, the union was seeking a declaratory judgment with respect to the rights of some 4,000 employees to receive pay for a day when they were absent from work. It would be anomalous indeed to hold that Congress, which, as Justice Frankfurter said in *Westinghouse*, was concerned with congestion in the federal courts, intended to bar suits by unions to establish the right of a large group of employees to additional pay, but to permit a union to bring before the federal court, by way of an action to compel arbitration, every small individual grievance which cannot be resolved with management.

III.

Under the Norris-LaGuardia Act a Federal Court Has No Jurisdiction to Compel Arbitration of a Labor Dispute

Section 1 of the Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue *any* restraining order or temporary or permanent injunction "in a case involving or growing out of a labor dispute", except in "*strict conformity*" with the provisions of the Act. The union's amended complaint in the present action alleges that the employee Boiardi was "paid at a lower rate of pay than specified in his job classification" (R. 44), that the employee Armstrong was arbitrarily and improperly discharged (R. 45), and that the plaintiff processed both grievances "without reaching agreement with defendant" (R. 44, 46). The action thus involves "a controversy concerning terms or conditions of employment" between an employer and an association of employees, and constitutes a "labor dis-

pute" as that term is defined in § 13 of the Norris-La-Guardia Act. As the court below held (R. 63), a dispute between an employer and a union over "terms or conditions of employment" is nonetheless a "labor dispute" because those terms or conditions are spelled out in a collective bargaining agreement. *W. L. Mead Inc.* v. *International Brotherhood of Teamsters*, 217 F. 2d 6 (1st Cir. 1954); *In re Third Avenue Transit Corp.*, 192 F. 2d 971 (2d Cir. 1951); *Alcoa Steamship Co., Inc.* v. *McMahon*, 73 F. 2d 567 (2d Cir. 1949); *Cf. United States* v. *United Mine Workers*, 330 U.S. 258, 270-271, 312-313 (1947).

Since a "labor dispute" was involved, the court had no power to compel arbitration unless the provisions of § 7 of the Act were complied with. That section provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" except upon findings of certain specified facts made after hearing testimony of witnesses "in support of the allegations of a complaint made under oath". Neither the original (R. 3) or amended (R. 42) complaint contained the requisite allegations, under oath, of the jurisdictional facts upon which the necessary findings could be made. Clearly, under the terms of § 7, a federal court could not grant the relief sought. *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (1938); *Wilson & Co.* v. *Birl*, 105 F. 2d 948 (3d Cir. (1939).

The court below correctly ruled (R. 64) that § 7 is not inapplicable on the theory that the relief sought was an order or decree for "specific performance" rather than an "injunction". Any such distinction

is one of words only. An "injunction", either mandatory or prohibitory, is the means by which specific performance is enforced. *Joy* v. *St. Louis*, 138 U.S. 1, 46 (1891); POMEROY, EQUITABLE JURISPRUDENCE § 1341 (5th ed. 1941); LEWIS & SPELLING, LAW OF INJUNCTIONS § 129 (1926). The power of a court to issue an "order" or "decree" compelling performance of a contract is governed by the same rules and principles as its power to grant an "injunction" against nonperformance. *Shubert* v. *Woodward*, 167 Fed. 47, 52 (8th Cir. 1909); *Engemoen* v. *Rea*, 26 F. 2d 576, 578 *Arizona Edison Co.* v. *Southern Sierras Power Co.*, 17 F. 2d 739, 740 (9th Cir. 1927). For all practical purposes an order unequivocally directing performance is an "injunction". *Independent Petroleum Workers of New Jersey* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *United States* v. *Kovich*, 201 F. 2d 470 (7th Cir. 1953); *Red Star Laboratories* v. *Pabst*, 100 F. 2d 1 (7th Cir. 1938). To hold otherwise would mean, for example, that despite the explicit prohibition of §4 of the Act against enjoining a strike, a no-strike clause could be enforced by the simple device of labelling the court's order a "decree for specific performance" rather than an "injunction". Obviously that would be a mere play upon words The courts have refused to employ such verbal subterfuges. See, *e.g.*, *Alcoa S. S. Co.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), *aff'd* 173 F. 2d 567 (2nd Cir. 1949) *cert. denied* 338 U.S. 821 (1949); *Colorado-Wyoming Express* v. *Denver Local Union No. 13*, 35 F. Supp. 155 (D. Colo. 1940).

Although admitting that the relief sought was an "injunction" and that the case involved a "labor dispute", the court below held that § 7 of the Act was

nevertheless inapplicable. It ruled that the plain words of that section denying jurisdiction to issue an "injunction in any case involving or growing out of a labor dispute" did not include injunctions against an employer's breach of a contract to arbitrate, since the only "injunctions" at which the section was aimed were those prohibiting "unilateral coercive conduct (R. 64), such as "union conduct in strikes and picketing" (R. 65). In effect, it read the words "injunction in any case" as if they said "injunction in certain types of cases".

In § 4 of the Act Congress did expressly bar federal courts from enjoining certain specific types of acts, including strikes, picketing and boycotting—the kind of "unilateral coercive conduct" to which the court below referred. But the Act is not confined to § 4. § 1 sweepingly prohibits *any* injunction, regardless of the type of conduct involved, *in any case* of a labor dispute except in conformity with § 7. The latter section repeats the same unequivocal prohibition, and then spells out the single instance in which injunctive relief can be given—namely, against unlawful acts causing irreparable injury to property for which there is no adequate police protection. Faced with what it believed to have been an unwarranted judicial erosion of the prohibitions of § 20 of the Clayton Act, Congress removed the federal courts entirely from any involvement in the whole area of labor controversies. The flat prohibition of §§ 1 and 7 against any injunction, and the very broad definition of "labor dispute" in § 13, make it plain that Congress intended "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present", *Wilson &*

Co. v. *Bird*, 105 F. 2d 948, 953 (3rd Cir. 1939). As this Court said, in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 101 (1940), after quoting § 1 of the Act:

> "This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes."

The court below supported its conclusion that the term "injunction" in § 7 did not include an injunction against an employer's breach of contract, by arguing that in such cases the required allegations and findings could seldom, if ever, be made (R. 66). In effect, that is to say that if a statute contains only a very narrow exception, the statutory command should be interpreted as not applying to cases which it is difficult, or impossible, to bring within the exception. Such reasoning makes §§ 1 and 7 of the Act practically meaningless. Indeed, the court below assumed the very point at issue in stating that Congress would have created "a snare and a delusion" (R. 66) if it had held out the possibility of jurisdiction but had demanded allegations and findings of inapposite facts as a prerequisite to the exercise of jurisdiction. Perhaps this might be so if Congress *had* held out such a possibility. But the language of the Act shows that it did *not* hold out any possibility of an injunction in any case of a labor dispute except in the very limited class of cases involving fraud or violence.

The reasoning of the court below runs squarely counter to a long line of decisions holding that the pro-

hibition of § 7 is not confined to cases of unilateral coercive conduct, such as that incident to strikes, picketing or boycotts. Again and again that section has been applied to bar injunctions against such non-coercive conduct as breaches of obligations under statutes or contracts, both in actions brought by unions as well as those by employers.[29]

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[29]See, *e.g.*, *Stanley* v. *Peabody Coal Co.*, 5 F. Supp. 612 (S.D. Ill. 1933) (union injunction to compel mine owners to comply with Bituminous Coal Code); *Cole* v. *Atlanta Terminal Co.*, 15 F. Supp. 131 (N.D. Ga. 1936) (union injunction to prevent use of Mediation Board certificate designating rival union bargaining representative under Railway Labor Act); *Moreschi* v. *Mosteller*, 28 F. Supp. 613 (W.D. Penn. 1939) (union injunction against employer's breach of agreement to employ only union labor); *Green* v. *Obergfell*, 121 F. 2d 46 (D.C. Cir. 1941) (union injunction to prevent parent union transferring jurisdiction over class of workers to another union); *Burlington Mills Corp.* v. *Textile Workers Union*, 44 F. Supp. 699 (W.D. Va. 1941) (employer injunction to prevent union filing unfair labor practice charge); *Wilson Employees Representation Plan* v. *Wilson & Co.*, 53 F. Supp. 23 (S.D. Calif. 1943) (union injunction against employer's breach of collective agreement); *United Packing House Workers* v. *Wilson & Co.*, 80 F. Supp. 563 (N.D. Ill. 1948) (same); *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F 2d 921 (10th Cir. 1942) (injunction by trucker to compel motor carriers to intercharge freight); *Southeastern Motor Lines* v. *Hoover Truck Co.*, 34 F. Supp. 390 (M.D. Tenn. 1940) (same); *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters*, 163 F. 2d 10 (5th Cir. 1947) (same); *California Ass'n* v. *Building Trades Council*, 178 F. 2d 175 (9th Cir. 1949) (injunction against union's refusal to bargain); *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. 2d 4 (8th Cir. 1947), *cert. denied* 334 U.S. 818 (1948) (union injunction against employer's cancelling collective agreement); *Duris* v. *Phelps Dodge Copper Products Corporation*, 87 F. Supp. 229 (D.N.J. 1949) (union injunction to compel employer to give full force and effect to collective agreement, in particular checkoff and recognition clauses); *Wilson* v. *Dias*, 72 F. Supp. 198 (E.D. Pa. 1947) (suit between unions); *Fitzgerald* v. *Abramson*, 89 F. Supp. 504 (S.D.N.Y. 1950) (union injunction against rival union accepting dues checked-off by employer).

In enacting the Act, Congress was aware that § 7 would bar relief in types of cases which could never be brought within its exception. Thus, in the course of the Senate debate on the bill, Senator Steiwer pointed out that employees had in the past, and might well in the future, seek an injunction against employers in circumstances where there were no "unlawful acts" within the meaning of § 7 and that in such a case relief would be barred. 75 CONG. REC. 4936, 4938. Supporters of the bill did not deny that such would be the case. They simply labelled the point as "academic". (75 CONG. REC. 4936, 4938). But no one suggested that the Act would not apply to such a situation.

The court below found support for its position in the decisions of this Court holding that the Norris-LaGuardia Act is not a bar to injunctions to compel compliance with the positive statutory mandates of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* *Virginia R. Co.* v. *System Federation,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Firemen* 338 U.S. 232 (1949). However, in those cases the plaintiffs were seeking to enforce an express right created by statute. This Court's conclusion that an injunction was not prohibited rested on the ground that the specific provisions of the Railway Labor Act repealed "the earlier and more general provisions of the Norris-LaGuardia Act". *Virginia R. Co.* v. *System Federation, supra,* at 563. As this Court said in the *Graham* case (338 U.S. 232, 237), to hold that the earlier act deprived employees of means of enforcing the bargaining rights specifically accorded by the Railway Labor Act would mean that "congress intended to hold out to them an illusory right

for which it was denying them a remedy" (338 U.S. at 240).[30]

The instant case presents an entirely different situation. The union here is not seeking to enforce a specific substantive right created by any federal statute. It is trying to compel performance of a contractual obligation. The court below itself held (R. 62) that there is no basis for regarding any section of the Norris-LaGuardia Act as having been repealed by § 301 of the Labor Management Relations Act under which the present action is brought. Indeed, that is conclusively settled. *Bakery Sales Drivers Local Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 217 F. 2d 6 (1st Cir. 1954); *Alcoa S. S. Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), *aff'd* 173 F. 2d 567 (2d Cir. 1949).

The court's decision that § 7 applies only in circumstances of coercive conduct of the type which could

[30]The case of *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955), *re hearing denied*, 350 U.S. 943 (1955), does not, as the court below suggested (R. 65), indicate an extension of the power to issue injunctions despite the provisions of the Norris-LaGuardia Act. In that case, negro employees brought an action attacking as illegal a collective agreement entered into by their bargaining representatives, on the ground that the seniority provisions of the agreement discriminated against them solely on account of race. The complaint sought a declaratory judgment that the contract was void, an injunction against its enforcement, and also damages. The District Court dismissed the complaint as a whole, holding that a federal court had no jurisdiction since the cause of action did not arise under the Constitution or laws of the United States, and the Court of Appeals affirmed (223 F. 2d 739 (5th Cir. 1955)). No question as to the applicability of the Norris-LaGuardia Act was raised. In reversing, in a *per curiam* opinion, and remanding the case for further proceedings, this Court did not, and had no occasion to, consider whether an injunction should be denied. All that was decided was that the cause of action alleged did arise under the laws of the United States.

result in violence, not only distorts the plain words of the Act but reaches a result which is inequitable and at variance with Congressional policy. The practical effect of that holding is to make arbitration agreements specifically enforceable only as against employers. A union, if it does not choose to submit to arbitration can strike and be protected by § 4. While such a strike "theoretically is not a bar to arbitration", for all practical purposes it is (See R. 68). Moreover, if the union did submit to arbitration and the award went against it, it could then strike rather than accept the award, and a federal court would be powerless to prevent its doing so. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956).

The court's decision, moreover, applies not only to arbitration clauses, but opens up the whole field of labor contracts to policing by injunctive process. Indeed, the Court of Appeals for the Third Circuit has very recently held, in reliance on the decision of the court below in this case, that the Norris-LaGuardia Act has no application to a union's action to enforce terms of the collective agreement other than the arbitration clause. *Independent Petroleum Workers of New Jersey* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956).

Similarly, breaches by unions of obligations undertaken by them, either with employers or with other unions, would be subject to injunction unless the breach happened to involve conduct of the type specified in § 4. As the collective bargaining relationship between employers and unions matures it is inevitable that more and more labor disputes will tend to be "non-coercive" in character. So, too, will the disputes between unions.

The decision below would subject to the injunctive processes of the federal courts a vast range of labor controversies, the precise nature of which cannot now be foreseen.

Whether courts should be able to enforce by injunction some or all provisions of labor contracts against employers, or against unions, or against both, is plainly a matter of policy. Legislatures have taken different views of that problem. The Pennsylvania legislature, for example, felt that courts should have that power and amended the state's anti-injunction act to authorize injunctions against breach of labor agreements.[31] Congress, on the other hand, deliberately refused to adopt a similar amendment. It faced the problem squarely in enacting the Labor Management Relations Act of 1947. In that Act it expressly excepted from the Norris-LaGuardia Act a limited class of cases—namely, proceedings by the National Labor Relations Board to enforce its orders preventing unfair labor practices (29 U.S.C. § 160 (h)), proceedings to enjoin certain illegal boycotts and strikes (29 U.S.C. § 160 (l)), proceedings by the Attorney General to enjoin strikes or lockouts imperiling the national

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[31]The Pennsylvania Labor Anti-Injunction Act, 1937, June 2, P.L. 1198, §§ 1 et seq., which was closely patterned after the Norris-LaGuardia Act, was held to bar injunctions against violations by employers of collective agreements. *Bulkins* v. *Sacks*, 31 Pa. D. & Co. R. 501 (1938); *Moreschi* v. *Mosteller*, 28 F. Supp. 613 (W.D. Pa. 1939). By an amendment in 1939, however, the legislature specifically excepted from the Act labor disputes "in disregard, breach, or violation of, a valid subsisting labor agreement" (1939, June 9, P. L. 302, § 1; Purdon's Penn Stat. Ann. Title 43, § 206d). In view of this amendment, the Pennsylvania courts now have jurisdiction to enjoin violations of collective bargaining agreements, including provisions for arbitration contained therein. *Philadelphia Marine Trade Assoc.* v. *International Longshoremen's Assoc., Local No. 1291*, 382 Pa. 326 (1955), *cert. denied* 350 U.S. 843 (1955).

safety (29 U.S.C. § 178 (b)) and proceedings to enjoin illegal payments to employee representatives (29 U.S.C. § 186 (e))—but it consciously refrained from lifting the prohibition of that Act as applied to actions to enforce collective bargaining agreements. A proposal to remove that prohibition was before it. Section 302 of the House Bill (which became § 301 of the Act), as reported and as passed by the House, expressly provided that in "actions and proceedings involving violations of agreements between an employer and a labor organization" the provisions of the Norris-LaGuardia Act "shall not have any application in respect of either party". § 302 (e), H.R. 3020, 80th Cong. 1st Sess. (1947). The minority members of the House Committee which had reported the bill attacked this "effort of the bill to open up the Federal courts to petitions for injunction in disputes involving violations of union agreements despite the present provisions of the Norris-LaGuardia Act banning injunctions in labor disputes, except after full hearing and upon certain findings", H.R. REP. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 110 (1947). The House bill as passed by the Senate eliminated this provision. The Senate version was adopted by the committee on conference[32] and enacted into law.

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[32] HOUSE CONF. REP. No. 510 on H.R. 3020, 80th Cong. 1st Sess., p. 66 (1947). In summarizing the results of the conference, Senator Taft reported to the Senate that the conference bill represented substantially the bill as passed by the Senate and that the conferees had "rejected the repeal of the Norris-LaGuardia Act" (93 CONG. REC. 6593, 6603 (1947)).

Thus, Congress, when confronted with the choice, was unwilling to pay the price of making the Norris-LaGuardia Act inapplicable in order to allow federal courts to enforce collective agreements. What Congress then refused to do, the court below has now done. Whatever justification may be found for judicial revision of statutes to accomplish a clear legislative purpose, certainly none can be found for judicial action contrary to what Congress itself did when it considered the particular question.

We have already referred to the inequality between unions and employers with respect to the enforcement of arbitration agreements created by the decision of the court below.—an inequality at variance with Congress' policy. Not only did the proponents of the original Norris-LaGuardia Act avow an intention to have the act apply mutually to labor and employers (See SEN. REP. No. 163, 72d Cong. 1st Sess. p. 9), but the chief object of Congress in 1947, in revising federal labor policy, was to remedy the inequities which had developed under the earlier law and to provide equality of treatment as between employees and employers. Pursuant to such objective Congress proscribed union as well as employer unfair labor practices. It compelled unions and employers alike to bargain in good faith, to refrain from discrimination or causing discrimination and to refrain from coercing employees in the exercise of guaranteed rights. Certainly it is beyond any reasonable speculation that Congress, having laboriously worked out a scheme of equal obligation, intended the inequitable result of allowing unions specifically to enforce employers' obligations by injunction, while employers remain helpless to obtain similar enforce-

ment of a no-strike clause, the chief, and often only inducement, to an employer to make a contract.

If it were left to Congress itself to authorize judicial enforcement of collective agreements, it could prevent such inequality by adopting a provision like that contained in the amendment to the Pennsylvania Labor Anti-Injunction Act, or that provided in Section 302 of the House Bill, H.R. 3020, 80th Cong., 1st Sess. (1947). But what has been accomplished, and all that can be accomplished, by amendment through judicial interpretation is a one-sided policy running contrary to the latest expression of Congressional intent.

CONCLUSION

Whether arbitration of disputes under labor contracts should be compelled by judicial process involves considerations of labor policy which it is the business of the legislature to determine. Congress has spoken on this matter in three statutes—the United States Arbitration Act, the Norris-LaGuardia Act and the Labor Management Relations Act. Those three statutes must be read consistently and in the light of the continuing Congressional awareness of the problem of enforcing arbitration agreements. So read, they make it plain that Congress has not evidenced any intention to provide for judicial enforcement of labor arbitration. At the most, evidence of a desire to *encourage* voluntary compliance with arbitration agreements may be found, but not to provide for judicial *enforcement*.

Both the Arbitration Act and the Norris-LaGuardia Act were products of the same era. It was the same distrust on the part of unions of the equity powers of the federal courts that led, on the one hand, to labor's opposition to the Arbitration Act and, on the other,

to its drive for the Norris-LaGuardia Act. The exclusion from the former Act of labor contracts and the prohibition of the latter Act against judicial interference in labor disputes reflect the same Congressional purpose to keep the courts out of the field of labor controversies.

It may be said that views and policies toward labor arbitration have greatly changed since the date of these statutes. But when in 1947 Congress enacted the Labor Management Relations Act, it took a new, hard look at the whole problem and decided to leave matters just where they stood. Even today there is no general uniformity of opinion on the question whether labor arbitration agreements ought to be subject to judicial enforcement. Discussions of the proposed new Uniform Arbitration Act, for example, indicate differing views, even by labor spokesmen, as to the soundness of bringing courts and court techniques into the labor arbitration field. But in any event, the issue is one which only Congress can resolve and, if the policy of judicial enforcement is to be established, only Congress can devise the comprehensive and consistent scheme necessary to carry it out effectively.

The judgment of the court below should be reversed.

Respectfully submitted

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APPENDIX

UNITED STATES ARBITRATION ACT, 43 Stat. 883, re-enacted 61 Stat. 669, 9 U.S.C. §§ 1-14, as amended by Act of September 3, 1954, 68 Stat. 1233.

"Maritime transactions" and "commerce" defined; exceptions to operation of title

SEC. 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Validity, Irrevocability, and Enforcement of Agreements to Arbitrate

SEC. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination

SEC. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

* * *

SEC. 8. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be

aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 156
29 U.S.C. § 185

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of action and proceeding by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principle office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NORRIS LAGUARDIA ACT, 47 STAT. 70, 29 U.S.C. §§ 101-115

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

* * *

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

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SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect —

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

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SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are

employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more ~~employees or associations of employees~~; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.